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. . . And The Supreme Court Buries McCarthyism

I

While the Senate last week was burying McCarthy, the U. S. Supreme Court buried McCarthyism. The decisions in the *Schware* and *Konigsberg* cases do more than decide that radicals have a right to practice law. The decisions turn their back on an era in which the mere allegation of Leftist sympathy or affiliation was enough to put a man outside the pale. A striking example will illustrate how unmistakably the Court has turned back the clock to an earlier and saner period. One of the charges on which the New Mexico Board of Bar Examiners refused to permit Rudolph Schware to take its tests for admission to the bar was his arrest and indictment in 1940 for recruiting volunteers to aid the Loyalists in Spain. The Supreme Court says, "even if it be assumed that the law was violated, it does not seem that such an offense indicated moral turpitude. . . . Many persons in this country actively supported the Spanish Loyalists," and it adds cooly, "In determining whether a person's character is good the nature of the offense which he has committed must be taken into account." This has a positive Rip Van Winkle-ish flavor; it awakens from a 20-year sleep the forgotten attitudes most thoughtful Americans shared at the time; it expunges two decades of carefully nurtured nightmare.

Even the Court's "Right Wing" Agreed

The words were those of Mr. Justice Black, but no longer speaking in last-ditch isolation for Black and Douglas dissenting. Here he spoke for a majority which included not only Chief Justice Warren and our new (Catholic) Justice, Brennan, but even—mirabile dictu—Mr. Justice Burton. Indeed the "right wing" of the Court in these two cases, Justices Frankfurter, Clark and Harlan, dissenters as we shall see in the *Konigsberg* case, saw no reason to dispute the majority's judgment in respect to Schware. They concurred in *Schware* and their concurring opinion indicates the change in atmosphere as strongly as does the majority decision. These three, speaking through Mr. Justice Frankfurter, object to the idea that it is the Supreme Court's function "to act as overseer of a particular result of the procedure established by a particular State for admission to its bar." They would interfere only when a man is not allowed to qualify himself for the bar "on a wholly arbitrary standard or on a consideration that offends the dictates of reason" and thus, in their opinion, runs athwart the Due Process clause. Only in such extreme circumstances would Justices Frankfurter, Clark and Harlan intervene. But they found such circumstances in the *Schware* case.

The circumstance which Justices Frankfurter, Clark and Harlan found "controlling" was the fact that the New Mexico Supreme Court, in upholding Schware's exclusion from the bar, laid its main stress on the fact that Schware was admittedly a member of the Communist party from 1932 to 1940. The New Mexico Supreme Court said it felt that "one who has knowingly given his loyalty to such a program and belief for six to seven years during a period of responsible adulthood is a person of questionable character." But the three concurring Justices find this "so dogmatic an inference as to be wholly unwarranted."

The Majority's Credo

"We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar."

—Mr. Justice Black, Konigsberg v. Calif. State Bar

End of A Witch Hunt Axiom

Mr. Justice Frankfurter writes, "History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of Communism during the depression era, only to have their eyes opened later to reality. Such experiences no doubt may disclose a woolly mind or naive notions regarding the problems of society. But facts of history that we would be arbitrary in rejecting bar the presumption . . . that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came to their senses . . . 'questionable characters'." That Tom Clark and Brownell's friend, John Marshall Harlan, should have joined in these words is a portent. For it has been one of the axioms of the witch hunt period, before and after McCarthy's own rise and fall, that once a Communist always a Communist, or at least a suspect. Not just Congressional committees but also the State Department, in its passport regulations, underwrote the notion that one could believe such a person sincerely non-Communist only if he informed on others, and thereby enlisted himself in the witch hunt. This was also one of the axioms of the Spanish Inquisition. Its explicit abandonment by minority as well as majority throws open the windows to fresh air.

II

A few years ago, when McCarthy was riding high, it is difficult to imagine the Supreme Court even agreeing to hear the Schware and Konigsberg appeals. The mingled facts and

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allegations would have made them seem too disreputable to deserve judicial intervention. Beside his past membership in the Communist party and his indictment for recruiting volunteers for Spain, Rudolph Schware had used a false name as a labor organizer, and had been arrested several times for "criminal syndicalism" during the 1934 general strike in California. Normally—or at least by the standards which had become normal during the cold war decade—this would have been regarded as more than sufficient to show bad character and therefore disqualify for admission to the bar. Raphael Konigsberg's record was as bad, if not worse, from this point of view, because his political derelictions were more recent. California's rules require that an applicant for admission to the bar must establish the fact that he is of good moral character and does not advocate violent overthrow of the government. Konigsberg had been identified as a Communist by an informer before the State's own [Tenney] Un-American Activities Committee. He had refused on First Amendment grounds to answer any questions put by the bar examiners as to his political beliefs and associations except to swear that he did not believe in violent overthrow. And he had written a series of editorials during the Korean War for a publication called the *California Eagle* which no one would ever have mistaken for pieces by Walter Lippmann. Indeed the editors of the *Daily Worker* might well have rejected some of them as on the intemperate side.

No Devotee of Understatement

The selections given in the briefs for the State Bar of California show that Mr. Konigsberg was not slavishly devoted to the cause of understatement. "Not all the criminal gangs in American history put together," he wrote in one editorial, "were as great a danger to our country's welfare as are the generals who today urge that American youth be trained as 'killers'. . . . None of the murders have been so sinful as a Dulles who uses religion to champion the anti-Christ. None such a threat to our security as a U. S. Attorney General who denies us the right to bail and tells brother to spy on brother." Another selection was headed, "The Cesspool" and subheaded "Traitor! Traitor!" (Mr. Konigsberg is not the kind of writer who spares the exclamation point). It was succinct, if not calm. "Betrayal is in the air," he wrote. "Judges with impunity violate our constitutional rights. . . . Stool pigeons are the new national heroes. . . . The President violates his oath of office by dragging us into war." Another selection said, "To consider loyalty to America as identical with Truman, Dulles & U. S. Steel is, to me, the ultimate in sacrilege. . . . Lynchers of Americans and engineers of the doctrine of guns over butter." Obviously Mr. Konigsberg is not one to use his First Amendment rights sparingly. The horrified bar examiners found these selections not only heretical politically but "morally deficient." His own intrepid attorneys, Edward Mosk and Samuel Rosenwein, must have wondered whether the Justices of the Supreme Court would not hastily pull the bedcovers over their heads after reading these selections and deny Mr. Konigsberg a hearing.

The majority seems to have regarded these brash utterances with a sense of humor that has been lacking here for some time. Indeed Mr. Justice Black exhumes from the record and cites in a footnote, with an almost audible chuckle, an editorial in which Mr. Konigsberg in his machine-gun prose centered his fire on the Supreme Court for refusing to hear the Hollywood Ten and said this made "that high tribunal an integral part of the cold war machine directed against the American people." Mr. Justice Black for the majority finds that these editorials "fairly interpreted only say that certain officials were performing their duty in a manner that, in the opinion of the writer, was injurious to the public. We do not believe that an inference of bad moral character can rationally be drawn from these editorials. . . . Courts are not, and should not be, immune to such criticism. Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." It has been a long time since a majority of the U. S. Supreme Court regarded radical utterances with such Hyde Park calm.

Not Impressed by 'Criminal Syndicalism'

"In 1934, while he was participating in a bitter labor dispute in the California shipyards, petitioner was arrested at least two times on 'suspicion of criminal syndicalism.' . . . The mere fact that a man was arrested has very little, if any probative value in showing that he has engaged in any misconduct. . . . Moreover here, the special facts surrounding the 1934 arrests are relevant in shedding light on their present significance. Apparently great numbers of strikers were picked up by police in a series of arrests during the strike at San Pedro and many of these were charged with 'criminal syndicalism.' The California syndicalism statutes in effect in 1934 were very broad and vague."

—Mr. Justice Black in Schware v. Bar Examiners

How the New Majority Evaluates Evidence of Past Communist Membership

"The suspicion that Konigsberg was or had been a Communist was based chiefly on the testimony of a single ex-Communist that Konigsberg had attended meetings of a Communist party unit in 1941. From the witness' testimony it appears that this unit was some kind of discussion group. On cross-examination she conceded that her sole basis for believing that Konigsberg was a member of that party was his attendance at these meetings. Her testimony concerned events that occurred many years before and her identification was not very convincing. . . .

"Even if it be assumed that Konigsberg was a member of the Communist party in 1941, the mere fact of membership would not support an inference that he did not have good moral character. There was no evidence that he ever engaged in or abetted any unlawful or immoral activities—or even that he knew of or supported any actions of this nature. It may be, although there is no evidence in the record before us to that effect, that some members of the party were involved in illegal or disloyal activities, but petitioner cannot be swept into this group solely on the basis of his alleged membership in that party.

"In 1941 the Communist party was a recognized political party in the State of California. Citizens of that State were free to belong to that party if they wanted to do so. The State had not attempted to attach penalties of any kind to membership in the Communist party. Its candidates' names were on the ballots California submitted to its voters. Those who accepted the State at its word and joined that party had a right to expect that the State would not penalize them, directly or indirectly, for doing so thereafter."

—Mr. Justice Black, for the majority, in Konigsberg v. Calif. State Bar

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III

The three dissenters in this case, Frankfurter, Harlan and Clark, do not find Mr. Konigsberg's literary style any evidence of moral dereliction, either. Mr. Justice Frankfurter objected only that it was doubtful whether Federal questions had been raised before the California Supreme Court; he would have remanded on jurisdictional grounds and asked the State tribunal to certify "whether or not it did in fact pass on a claim properly before it under the Due Process clause of the Fourteenth amendment." Mr. Justice Harlan, with Mr. Justice Clark concurring, went further. They objected that the burden of proof is on the applicant for admission to the bar, and that the bar examiners had a right to ask questions about his political affiliations in order to test his "bare assertion" that he did not believe in overthrow of the government by force and violence, especially since the majority did not go so far as to hold that such questions were privileged under the First Amendment. Even these two Justices made it clear that they were not arguing that a man could be barred from the law "because of bare membership, past or present, in the Communist party" or "because of his political views." They argued only that the bar examiners were prevented from discharging their "statutory responsibilities" by the applicant's refusal to answer questions. It is quite a change when the Court's right wing goes no further right than that.

First Amendment Claims Not Frivolous

The majority, as if celebrating a kind of field day after the long winter of judicial evasion and abnegation, has no time for such craftsmanlike legal conservatism. "The State argues," Mr. Justice Black says, "that Konigsberg's refusal to tell the examiners whether he was a member of the Communist party or whether he had associated with persons who were members of that party or groups which were allegedly Communist dominated tends to support an inference that he is a member of the Communist party and therefore a person of bad moral character. We find it unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded. Prior decisions by this court indicated that his claim that the questions were not improper was not frivolous * and we find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the U. S. Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted." This gives new weight and dignity to claims of First Amendment privilege.

It is always hazardous to draw straight lines from general propositions in current cases to the outcome of other future cases. But it is hard not to be hopeful about a court on which a majority of the members, [the newest judge, Whittaker, took no part], regard so astringently views, facts and allegations which until recently would have been damning. The two appellants, Schware and Konigsberg, though men with honorable war and civilian records, would have been crucified by a McCarthy. Liberals, middle-of-the-roaders and conservatives alike on this Court seem prepared to take an adult view of past Communist party membership, and a respectful attitude toward First Amendment claims. They seem prepared at last here, as in other free societies, to untangle the real problems of Communism from the hobgoblins of cold war demonology. Whatever that evil and unscrupulous adventurer McCarthy died of, a black sense of failure and public rejection hastened his sodden end. His punier successors are likely to contract similar ailments when they ponder on the Schware and Konigsberg decisions. It looks as if the witch hunt is drawing to its close.

*** Here, in a footnote, the Court cites opinions more honored recently in the breach than the observance: U. S. v. Rumely, Thomas v. Collins, West Va. Brd. of Ed. v. Barnette, Cantwell v. Conn. and De Jonge v. Oregon (all past landmarks of civil liberties) and quotes from Jones v. Opelika, "Freedom to think is absolute of its own nature. . . ."**

A Lifetime of Good Citizenship

"Here, 42 individuals who had known Konigsberg at different times during the past 20 years attested to his excellent character. . . . Included among them were a Catholic priest, a Jewish rabbi, lawyers, doctors. . . . Even more significant, not a single person had testified that Konigsberg's moral character was bad or questionable in any way. . . . The mere fact of Konigsberg's past membership in the Communist party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Bar Committee's action."

—Mr. Justice Black, Konigsberg v. Calif. State Bar

The Majority Holds Party Membership Alone No Proof of Wrongdoing

"The [New Mexico] court assumed that in the 1930's when petitioner was a member of the Communist party, it was dominated by a foreign power and was dedicated to the violent overthrow of the Government and that every member was aware of this. It based this assumption primarily on a view of the nature and purposes of the Communist Party as of 1950 expressed in a concurring opinion [by Mr. Justice Jackson] in Communications Association v. Douds, 339 U.S. 422 [upholding the non-Communist oath provisions of the Taft-Hartley Act], however that view did not purport to be a factual finding and obviously it cannot be used as a substitute for evidence in this case to show that petitioner participated in any illegal activity or did anything morally reprehensible. . . .

"Schware joined the Communist party when he was a young man during the midst of this country's greatest depression. Apparently many thousands of other Americans joined him in this step. . . . Later the rise of fascism as a menace to democracy spurred others who feared this form of tyranny to align with the Communist party. After 1935, that party advocated a 'Popular Front' . . . Its platform and slogans stressed full employment, racial equality and various other political and economic changes. . . .

"Assuming that some members of the Communist party during the period from 1932 to 1940 had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct. . . ."

—Mr. Justice Black in Schware v. New Mexico Bar Examiners

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One Easy Way to End Controversy About Jury Trials in Civil Rights Cases

Hans Bethe Denies (Privately) That A-Tests Are Not Always Detectible

At a meeting of atomic physicists here, Hans Bethe, perhaps the world's foremost authority on the subject, angrily denied the British government's claim that not all atomic tests can be detected, and that a world agreement to end tests would therefore not be self-enforcible. But Bethe is still inhibited by his relations with the Atomic Energy Commission from saying this publicly.

One way to break the deadlock over jury trials in contempt cases arising out of civil rights legislation would be to provide that the juries should be equally divided between the races. The jury is supposed to represent the opinion of the community, but an all white Southern jury only reflects the opinion of the white community.

During the NATO meeting, the German Foreign Minister, von Brentano, held a press conference. He indicated in reply to a question that the NATO powers had agreed that they would make no disarmament agreement with the Soviet Union unless Moscow first accepted Western terms on reunification of Germany, i.e. that the reunited Reich become a member of NATO. Little attention has been paid by the press outside Germany to this remark but, if true, then the disarmament talks are eye-wash and the real purpose of the arms race is not "deterrence" but pressure on Moscow to surrender on the German question.

The London *Sunday Times* (May 5) interprets the new Krushchev plan for decentralization of industry as determined in part by fear of atomic war. "One atom bomb on Moscow under the old system," it says, "would have crippled any war effort."

Thomas E. Murray's term as Atomic Energy Commissioner expires June 30 and unless some public support can be whipped up he is unlikely to be appointed to a new five-year term. We were surprised and pleased to see that the New York *Daily News* (May 8) came out for his reappointment. It said it could not go along with his "ultra-noble" ideas on the H-bomb and thinks him wrong 9 times out of ten. "But Murray up till now," the *News* said, "has been the only man on the five-member AEC who has had the courage to talk back in public to Chairman Lewis L. Strauss" and "it is healthy to have one bold No-man on any government commission."

In Memoriam

Of that wonderful breed of assorted liberals, radicals and idealists who made the New Deal what it was few remain in Washington, and of that few there are fewer still who have not abdicated political and moral responsibility to live safely reconciled in the current atmosphere. Mrs. Frances Wheeler Sayler, who has just died here, was one of those few. In the Women's Bureau of the Labor Department, with the La Follette Committee, later in the Committee to Abolish the Poll Tax, afterwards as legislative representative of the U.E., her life was one of happy service in the cause of social reform. Even recently, though terribly and fatally ill, she found ways of being active, and ran a quietly successful campaign to open the movie houses of Rockville, Md., and the eating establishments of Silver Springs, Md., to Negroes. As a person she radiated a joyful faith and kindliness. This issue is dedicated to her memory.

Alger Hiss's *In the Court of Public Opinion* is a better book than Earl Jowitt's rather condescending volume. Its closely argued legal analysis leaves one with a feeling of reasonable doubt but until there is some new break in the case it will remain the biggest question mark of our times. Hiss in effect is called upon after the passage of so many years to prove a negative. We have asked Vern Countryman, formerly of Yale Law School to review the book in our next issue.

Little-candle-in-a-naughty-world note: Walter S. Salant, a professional economist, and H. Field Haviland, Jr., a professor of political science at Haverford College, had the temerity to publish a joint letter in the *Washington Post* (May 4), apropos the Norman suicide, defending the study of Marxism against current house-dick ideology. "If anything needed defense," Messrs. Salant and Haviland wrote bravely, "it would be the failure of a serious student to give some attention to Marx's work." This was read with a gulp in Washington where in many homes stray volumes of Marx were long ago relegated to that dark spot behind the furnace.

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